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NO. 58336-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITY OF SEATTLE,

Appellant,

v.

JESUS QUEZADA,

Respondent.

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COURT OF APPEALS
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. ISSUE PRESENTED	1
B. STATEMENT OF FACTS	1
C. ARGUMENT	4
The City's interpretation of RCW 46.61.5055, which ignores the statute's plain language and produces an absurd result, should be rejected.....	4
D. CONCLUSION	19

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Advanced Silicon Materials v. Grant County</u> , 156 Wn.2d 84, 124 P.3d 294 (2005)	12
<u>Berrocal v. Fernandez</u> , 155 Wn.2d 585, 590, 121 P.3d 82 (2005).....	13
<u>City of Kent v. Jenkins</u> , 99 Wn. App. 287, 992 P.2d 1045 (2000)	5, 6
<u>In re Recall of Pearsall-Stipek</u> 141 Wn.2d 756, 10 P.3d 1034 (2000)	8
<u>Pacific Sound Resources v. Burlington Northern Santa Fe</u> , 130 Wn. App. 926, 125 P.3d 981(2005)	13
<u>State v. Collicott</u> , 118 Wn.2d 649, 665 827 P.2d 263 (1992).....	16
<u>State v. Elgin</u> , 118 Wn.2d 551, 825 P.2d 314 (1992)	16
<u>State ex rel. Schillberg v. Barnett</u> , 79 Wn.2d 578, 488 P.2d 255 (1971)	7
<u>State v. Gore</u> , 101 Wn.2d 481, 681 P.2d 227 (1984)	18-19
<u>State v. Jacobs</u> , 154 Wn.2d 596, 115 P.3d 281 (2005)	11
<u>State v. Mannering</u> , 112 Wn. App. 268, 48 P.3d 367 (2002)	13
<u>State v. Olson</u> , 47 WA. App. 514, 735 P.2d 1362 (1987).....	8

State v. Whitaker,
112 Wn.2d 341, 771 P.2d 332 (1989)14-17

State v. Williams,
128 Wn.2d 341, 908 P.2d 359 (1995) 8

RULES, STATUTES AND OTHERS

RCW 9.94A.360 11, 15, 16

RCW 46.61.5055 1, 3-12, 15-17

A. ISSUE PRESENTED

The legislature created a sentencing scheme for defendants convicted of driving while intoxicated, under which there is an increasingly severe punishment for each new offense. Under the City's novel interpretation of this statute, a defendant will routinely be sentenced twice for a "second" DUI offense, instead of being punished once for a "first" and once for a "second" offense. Should this Court reject the City's reading of RCW 46.61.5055, a reading that ignores the plain meaning of "prior offense", and produces "unlikely, absurd, or strained consequences"?

B. STATEMENT OF FACTS

Everyone has his or her own demons to fight. For Jesus Quezada, it has been alcohol. Although a strong worker and loving father, Jesus struggles with a significant drinking problem. See CP 22-24. In 2001, he drove while intoxicated and entered a plea to that offense. The following year, in 2002, he committed the same offense and entered into a deferred prosecution in Seattle Municipal Court. Jesus went through treatment, and appeared to be on the road to recovery when, in 2005, he once again drove after drinking and was charged in Renton Municipal Court with DUI. CP

22. The prosecutor eventually reduced the charge to reckless driving, and Jesus entered a plea of guilty. CP 6.

Following the plea in Renton, Jesus appeared in Seattle Municipal Court where he acknowledged that the Renton conviction constituted a violation of his deferred prosecution. CP 22. Judge Michael Hurtado revoked the deferred prosecution and proceeded to the imposition of sentence. CP 27-31.

The court read letters from members of the community, which described how Jesus had allowed his battle with alcohol to be told on Spanish speaking radio, how he served as a volunteer at a gym for low income, high risk kids, how he participated in Head Start activities with his children, and how his employer relied upon Jesus for his work ethic and stability. See CP 21-23. The court also learned how Jesus had checked himself into treatment following this incident, and the progress he had made through that treatment. CP 22, 24. In addition to the letters, the court also heard testimony from Ms. Flores, a case manager at First Place. CP 23. She described Jesus' involvement in school meetings, and how Jesus serves as a role model for other males within that community, where fathers too rarely participate in this type of activity. CP 24-25.

There was a dispute at the hearing as to whether this was a second or third offense for purposes of the mandatory minimum. Both parties agreed that the 2001 DUI conviction was a prior offense. The City, however, apparently believed the recent 2005 reckless driving conviction should be counted as a “prior offense,” which would make the 2002 deferred prosecution the third such offense. CP 26-27. The trial court disagreed, and treated the revoked deferred prosecution as a second offense. CP 26, 29. The City appealed. CP 2.

On RALJ appeal, the superior court agreed with the trial court’s reading of the statute. The superior court recognized that RCW 46.61.5055 did not require the court to consider “all offenses” in determining the mandatory minimum. Rather, the legislature required the court to include only “prior” offenses. This, explained the RALJ court, was the flaw in the City’s argument—the City ignored the legislature’s use of the word “prior” to modify “offense.” CP 57-58. Looking at the plain meaning of “prior” in connection with the other statutory language, the court concluded:

Thus, a prior offense within seven years must mean that the arrest for the prior offense preceded in time the arrest for the current offense, and was within seven years of the current offense. Here, the defendant’s arrest for the DUI/Reckless offense occurred in

2005 and therefore did not precede in time the 2002 arrest on the current offense. Accordingly, the 2005 DUI/Reckless offense was not a prior offense that occurred within seven years of the current offense. Hence, the trial court correctly determined that the defendant had one "prior offense" rather than two prior offenses, thus triggering the provisions of RCW 46.61.5055(2).

CP 58.¹

C. ARGUMENT

The City's interpretation of RCW 46.61.5055, which ignores the statute's plain language and produces an absurd result, should be rejected.

1. Overview

The Washington legislature has created a sentencing scheme for defendants convicted of DUI, whereby each successive conviction results in a more severe mandatory penalty. For instance, a defendant convicted of a first DUI with a BAC of 1.5 or greater will face a minimum two days in jail for a first offense, 45 days for a second offense, and 120 days for a third. RCW 46.61.5055(1)-(3). Although the sentencing court may go above the mandatory minimum whenever the court believes it appropriate to do so, the court may not go below that minimum, except in very

¹ The City also challenged the trial court's imposition of electronic home monitoring in lieu of jail time. The superior court agreed with the City on that issue and found that the trial court had erred in converting the jail time to electronic home monitoring. CP 58-59. Mr. Quezada did not appeal the ruling.

limited circumstances involving “extraordinary medical” necessity. RCW 46.61.5055(11).

In order to determine the mandatory minimum, the sentencing court must determine the number of qualifying convictions. RCW 46.61.5055(12)(a). In addition to actual convictions, that list includes previously granted deferred prosecutions, with the date on which the deferred prosecution was granted serving as the “conviction” date. Id; Kent v. Jenkins, 99 Wn. App. 287, 290, 992 P.2d 1045 (2000).

The City’s appeal in this case raises an issue as to how the prior offenses are to be counted when a defendant is revoked on a deferred prosecution based upon a new conviction. Under the City’s creative interpretation of the sentencing statutes, instead of a first and second offense, as the law dictates, the court is *required* to impose much harsher penalties by treating both offenses as a second offense.

This becomes easier to understand when a typical scenario is considered. Assume a defendant is arrested and charged with his first DUI in 2000. He enters into a deferred prosecution. Four years later, in 2004, he is charged and convicted of the same offense. Under the applicable sentencing statute, the court must

treat the earlier deferred prosecution as a “prior offense” for purposes of the mandatory minimum. This means that the 2004 offense is punished as a second offense, rather than a first. See RCW 46.61.5055(12)(a); Jenkins, supra, at 290.

The defendant is then revoked on his earlier 2000 deferred prosecution based on the new 2004 conviction. Under the superior court’s understanding of the statute, this revoked deferred prosecution should be treated as his first offense, as the defendant has already been more harshly punished for a “second” DUI, the one which occurred in 2004. Because the 2004 offense was not committed prior to the 2000 DUI, it is not a prior offense. The result is the defendant is properly punished for a first and second offense.

Under the City’s interpretation of the statute, however, there is no first offense in this scenario. Instead, the court is required to punish the defendant as if he committed two independent second offenses: the 2000 deferred prosecution is a “prior offense” for the 2004 DUI, and the 2004 DUI is then treated as prior offense for the 2000 DUI.

As set forth below, this novel interpretation is an unfair and strained reading of the statute, which ignores the plain language of the statute, and is contrary to the obvious intent of the legislature to

promote proportionate punishment. Additionally, to the extent that the City's interpretation could be characterized as reasonable, it must be rejected under the rule of lenity.

2. Both the plain language and rules of statutory construction support the lower courts' rulings

The question presented by this case is a simple one: when the court sentences a defendant on a revoked deferred prosecution, must the court include all offenses or just prior offenses in determining the mandatory minimum? The City does not perceive a temporal limitation on which offenses must be counted, believing that all convictions of the specified type—no matter when they occurred—must be included in the mandatory minimum. The trial court and superior court both rejected the City's argument, recognizing that the legislature intended the word "prior" to modify "offenses."

The superior court's holding is well supported by the law. The legislature's use of the word "prior" cannot be ignored, as "each word of a statute is to be accorded meaning." State ex rel. Schillberg v. Barnett, 79 Wn.2d 578, 584, 488 P.2d 255 (1971). Under the City's interpretation, the legislature could have completely omitted the word "prior", and the statute would still have the

same meaning. As such, the City's interpretation ignores one of the fundamental rules of statutory construction—that the legislature is “presumed to have used no superfluous words and [the court] must accord meaning, if possible, to every word in a statute.” In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000); see also, State v. Williams, 128 Wn.2d 341, 349, 908 P.2d 359 (1995) (“we are duty-bound to give meaning to every word that the Legislature chose to include in a statute and to avoid rendering any language superfluous.”)

In the present case, the superior court relied upon the common understanding of the word “prior”, read in context with the rest of the statute, to conclude that the 2005 incident was not a prior offense to the 2002 deferred prosecution. See State v. Olson, 47 WA. App. 514, 516-17, 735 P.2d 1362 (1987) (statutory term may be given its dictionary meaning).

The City argues that the trial court improperly relied upon the common meaning of “prior” rather than the statutory definition contained in RCW 46.61.5055(12). See AOB at 6-7. This argument has some surface appeal, particularly given that this definitional section of the statute does refer to “prior offense.” But upon closer examination, it is apparent that the statute does not attempt to de-

fine "prior." Instead, when read in context, the provision simply provides a laundry list of the various types of convictions and court proceedings that can constitute a prior offense for purposes of establishing the mandatory minimum. RCW 46.61.5055(12) provides:

For purposes of this section:

(a) A "prior offense" means any of the following:

(i) A conviction for a violation of RCW 46.61.502 or an equivalent local ordinance;

(ii) A conviction for a violation of RCW 46.61.504 or an equivalent local ordinance;

(iii) A conviction for a violation of RCW 46.61.520 committed while under the influence of intoxicating liquor or any drug;

(iv) A conviction for a violation of RCW 46.61.522 committed while under the influence of intoxicating liquor or any drug;

(v) A conviction for a violation of RCW 46.61.5249, 46.61.500, or 9A.36.050 or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522;

(vi) An out-of-state conviction for a violation that would have been a violation of (a)(i), (ii), (iii), (iv), or (v) of this subsection if committed in this state;

(vii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502, 46.61.504, or an equivalent local ordinance; or

(viii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.5249, or an equivalent local ordinance, if the charge under which the deferred prosecution was granted was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522; and

(b) "Within seven years" means that the arrest for a prior offense occurred within seven years of the arrest for the current offense.

RCW 46.61.5055(12). The subsection does not seek to define "prior;" nor does it purport to remove the requirement that the offense occurred prior to the crime for which the defendant is being sentenced. It simply delineates what type of offenses should be considered by the court in determining the mandatory minimum.

The City also claims that the superior court failed to consider "prior offense" in context with other related statutes. According to the City, when read in context, "a 'prior offense' must occur prior to sentencing—not other offenses." AOB at 8. In other words, according to the City, the word "prior" serves to notify the sentencing court that it should not consider any offenses that occurred after the sentencing hearing. But this interpretation makes little sense, as the sentencing court could not possibly include an offense that occurred *after* the current sentencing. Under the City's reading, the word "prior" would not in any way restrict or modify "offense," so there would be no difference between "offense and "prior offense." As previously noted, a definition that renders a term meaningless violates the rules of statutory construction.

It is interesting to note that under the SRA, a “prior offense” does have the meaning suggested by the City. Within the context of the SRA, however, such an interpretation makes sense. Because the SRA differentiates between current and prior offenses, the term “prior offense” distinguishes those prior offenses from others. Outside the SRA, however, there is no such distinction. It is also significant to note that because the legislature employed a less common meaning to the word “prior” for purposes of the SRA, the legislature specifically defined that term. See RCW 9.94A.360(1) (“A prior conviction is a conviction which exists *before the date of sentencing* for the offense for which the offender score is being computed.”) The specific definition in the SRA stands in sharp contrast to the lack of any such definition in the DUI sentencing scheme.

The City is correct, however, that terms in a statute should be read in context with related provisions. See State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005) (“The ‘plain meaning’ of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.”)

Here, reading the statutes in context, such a reading further supports the superior court's conclusion that the focus is upon the date of the arrest in determining what constitutes a prior offense. For instance, in determining whether a prior offense has washed-out, the court is directed to look at the time that has passed between the *date of the arrest* for the prior offense and *the date of arrest* for the current offense. See RCW 46.61.5055(12)(b) ("Within seven years" means that the arrest for a prior offense occurred within seven years of the arrest for the current offense."). It is significant that the focus is not upon the date of the conviction or sentencing, but upon the date of arrest. This supports the trial court's determination that when determining legislative intent behind the word "prior", the unit of measurement employed by the legislature is the arrest date.

One of the primary tenets of statutory construction: courts should "avoid readings of statutes that result in unlikely, absurd, or strained consequences." Advanced Silicon Materials v. Grant County, 156 Wn.2d 84, 90, 124 P.3d 294 (2005). The City's reading of the statute, where a defendant is punished twice for second offenses rather than a first and a second, produces exactly that—an unlikely, absurd, and strained consequence.

As the Washington Supreme Court has explained, “In undertaking this plain language analysis, the court must remain careful to avoid 'unlikely, absurd or strained' results.” Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005) (citations omitted). Accordingly, “[w]e give words used in the statute their plain meaning, but we construe the statute to effect its purpose and avoid ‘[u]nllikely, absurd or strained consequences resulting from a literal reading.’” State v. Mannering, 112 Wn. App. 268, 272, 48 P.3d 367 (2002) (citations omitted).

Here, the purpose of the statute is to provide a proportionate sentence, with a first offense receiving less than a second offense, and a second offense receiving less than a third. The City’s interpretation of the statute, in addition to producing a strained and unlikely result, fails completely in this goal of proportionality. Under the City’s reading of the statute, a judge would be required to punish a defendant twice for second offenses, without ever punishing a defendant for a first offense. Because this is contrary to the legislative intent of proportionality, it must be rejected. Pacific Sound Resources v. Burlington Northern Santa Fe 130 Wn. App. 926, 935, 125 P.3d 981(2005) (“We interpret statutes to effectuate legislative intent.”)

On appeal, the City attempts to turn this argument around and argues that the superior court ruling produces an absurd result because it permits a defendant to avoid higher penalties by pleading guilty in reverse order. AOB at 11-12. As a practical matter, it is doubtful there are many cases in which a defendant has multiple pending DUIs and is allowed to pick what order he will plead guilty. Far more common is the situation where a defendant will face a revocation hearing on a deferred prosecution based on a new conviction.

But putting aside the improbability of the concern expressed by the City, there is a mechanism for correcting any unfairness resulting from a defendant pleading guilty to multiple offenses in reverse order. If the statute produces a mandatory minimum that is too lenient, the court can always impose a higher sentence. By contrast, under the City's interpretation, if the statute requires both convictions to be treated as second offenses, the sentencing court has no mechanism to correct that inequitable result. Because this is a strained and illogical result that flies in the face of the legislative goal of proportionality, it must be rejected.

In State v. Whitaker, 112 Wn.2d 341, 771 P.2d 332 (1989), the Washington Supreme Court was confronted with a similarly

strained result as that presented by the City's argument in the current case. The court in that case addressed a situation where sentencing had been deferred on a vehicular manslaughter and Whitaker placed on probation in 1981. The state subsequently moved to revoke the deferred sentence. In the interim, Whitaker had been convicted of a 1986 offense. The state argued the 1986 offense would count in the 1981 offender score. Whitaker, at 342-43. The state made this argument based on the new SRA language that specifically required the court to count all offenses existing on the date of sentencing. RCW 9.94A.360(1).

The question presented in Whitaker was whether the sentencing court could turn back the clock and consider the 1986 conviction a "prior conviction" in determining the appropriate sentence for the 1981 offense. The Supreme Court rejected the state's position, reasoning:

To hold otherwise would be illogical, because the 1981 offense had already been counted as a prior conviction served, for purposes of fixing the 1986 minimum term, and then later, the 1986 offense would be counted as a prior conviction, for purposes of fixing the 1981 minimum term. That is, each offense would be treated as a prior conviction to the other.

Whitaker, at 346.

What is notable in Whitaker is that the Supreme Court was confronted with statutory language in the SRA that specifically required the court to consider all convictions that existed as of the date of sentencing. Whitaker, at 344; RCW 9.9A.360(1). But even then, the Court was unwilling to interpret the interplay of statutes in a way that would permit this illogical result. The Whitaker court determined that the appropriate solution for cases involving revoked deferred sentences and mandatory minimums under the SRA, was to treat the date the conditions of probation were initially imposed (which is the day the deferred was granted) as the “date of sentencing” for purposes of determining the mandatory minimum. In that way, offenses that were committed after the defendant entered into the deferred, would not be included in the mandatory minimum if the deferred sentence was later revoked. Whitaker, at 345-47.² See also State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992) (the “spirit or purpose of an enactment should prevail over the express but inept wording.”)

The concerns presented by a deferred sentence apply with equal force to deferred prosecutions. For purposes of subsequent

² Because the SRA eliminated deferred sentences, this was a transitory problem. Subsequent cases have limited the holding in Whitaker to revocation matters (See State v. Collicott, 118 Wn.2d 649, 665 827 P.2d 263 (1992)), similar to what is present in the current case.

convictions, the day the court granted the deferred prosecution is considered the conviction date. But the sentencing date on a revoked deferred prosecution usually occurs at a much later time after new offenses have occurred. Thus, if the City were correct that “prior offenses” included all offenses existing as of the date of sentencing, then both the revoked deferred prosecution and the new offense would each count against each other as a “prior offense.” This would produce the “illogical” result that the Whitaker court refused to permit.

Fortunately, unlike in Whitaker, this Court is not presented with a statute that specifically requires the lower court to include all offenses existing at the time of sentencing. Accordingly, this Court need not craft a special rule for deferred prosecutions, such as what the Whitaker court did for deferred sentences. Instead, this Court can avoid that same illogical and strained result by interpreting RCW 46.61.5055 in the commonsense manner employed by the superior court.

As discussed above, the City’s interpretation of the statute should be rejected as it ignores the word “prior” and produces absurd, strained or unlikely consequences. But even if there was a

legitimate question as to the meaning of “prior”, the City’s interpretation could not overcome the rule of lenity.

Where more than one interpretation of a statute is possible, the rule of lenity requires the statute to be interpreted most favorably to the defendant. State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). (“Where two possible constructions are permissible, the rule of lenity requires us to construe the statute strictly against the State in favor of the accused.”) The rule of lenity applies with equal force to sentencing statutes. See State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

In Jacobs, the trial court believed that the applicable statute required the defendant’s sentencing enhancements to run consecutive to each other. Division Two of the Court of Appeals reached the same conclusion, and affirmed the consecutive enhancements. The Washington Supreme Court accepted review. The defense argued that the statute was not clear, and that the rule of lenity applied, while the State argued that allowing the sentences to run concurrently would “render meaningless the purposes the legislature intended for one of the enhancements.” Id. at 602. While cognizant of the State’s concern, the Supreme Court held that because evidence of the legislature’s intent did “not conclusively resolve the

issue,” the rule of lenity required the sentences to run concurrent.
Id. at 603-04.

In the present case, the legislative intent should be clear: the legislature did not intend the strained result advocated by the City. As such, it is plain that the statute must be interpreted to look at the timing of the offenses. But even assuming there was some ambiguity as to this plain reading of the statute and as to the legislative intent, the rule of lenity would require this Court to reject the City’s interpretation and affirm the trial court.

D. CONCLUSION

The superior court correctly interpreted the statute. Because the 2005 reckless driving could not be a “prior offense” for the 2002 deferred prosecution, the trial court was not required to count it when calculating the mandatory minimum sentence. Respondent respectfully asks this Court to affirm the superior court’s decision.

Dated this 9th day of FEB., 2007


James R. Dixon, WSBA 18014
Attorney for Respondent

Certificate of Service

The undersigned certifies that on this day he did deliver to the attorney of record for the City of Seattle a true and correct copy of the document to which this certificate is attached

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed in Seattle, WA on the date listed below.

2/19/07
Date

J. N. O. X
Signature

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